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THE common law on any point," says Judge Baldwin, "existed, in theory at least, before any case in which it may be applied. It was the practice of the people, or the rule which to them seemed naturally right." [1] Hence he argues that the teacher or writer who endeavors to put scientific method behind the reported cases which form the chief jural materials of our Anglo-American system is too academic. His teaching has "created a new peril" in our law since it leads to neglect of the "human element" of popular practice, of which the rule is a mere formulation.[2] Others reach in another way a similar conclusion adverse to logical analysis and systematic development of legal materials. Thus we are told that "the rules of law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker." [3] Again: "The law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately

[1] "Education for the Bar in the United States," 9 AMERICAN POLITICAL SCIENCE REVIEW, 437, 447.

[2] *Id.* 448.

[3] BROOKS ADAMS IN CENTRALIZATION AND THE LAW, 45.

"Upon conditions that the ruling class finds profitable to its aims and advantageous to its power, are built codes of morality as well as of law, which codes are but reflections of those all-potent class interests." MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 8.

"From this point of view we get the meaning also of the statement often made that law tends to spread, to generalize itself. The spreading, the generalizing, is dominated entirely by interest-group needs." BENTLEY, THE PROCESS OF GOVERNMENT, 287. Compare Mr. Dooley: "The Supreme Coort follows th' illiction rethurns."

these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign." [4] Hence "there are . . . no abstract legal principles." [5] "The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves." [6] It is futile to do more than perceive the ideal of justice that "favors most perfectly the dominant class" [7] and observe how the law inevitably conforms thereto. On either theory the jurist is no more than an observer; the legislator or judge is but the subconscious instrument through which the popular practice is formulated or the will of the dominant class is made effective. There is nothing for the teacher of law to do beyond orderly arrangement for the purpose of dogmatic exposition. The rules are given. He is to set them forth as so many propositions of a unique series of independent phenomena.

Such views are in large part to be explained as a reaction from the nineteenth-century theory of eternal legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction. Indeed Judge Baldwin speaks the language of that doctrine when he says that the common-law rule existed in theory before the case in which it was discovered and applied. Moreover it would be idle to pretend that there are not rules in any legal system of which one or the other of the foregoing views gives an accurate account. Thus the rules as to indorsement of negotiable instruments arose out of the custom of merchants, and our law of mining on the public domain had its origin in the custom of miners. Likewise there is much in the ephemeral penal legislation of every country which fails to maintain itself in the legal system precisely because it is an expression of the self-interest of the dominant class for the time being and nothing more.[8] Yet before we accept

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[4] CENTRALIZATION AND THE LAW, 23.

[5] *Id.* 45.

[6] *Id.* 63–64.

[7] *Ibid.*

[8] Compare legislation as to cutting weeds to prevent their going to seed (Indiana, BURNS' ANN. STAT. 1914, §§ 5524–25; Texas, MCEACHIN'S CIV. STAT., Arts. 6601–02) with the common law as set forth in Giles *v.* Walker, 24 Q. B. D. 656 (1890); Harndon *v.* Stultz, 124 Iowa, 734, 100 N. W. 851 (1904). Also compare the common law as to contributory negligence with recent American statutes altering the rule solely for the benefit of railway employees, leaving the common law in force for all other cases.

either as an adequate account of the genesis of law in general, and so give over the attempt to deal academically with law as a rational phenomenon, it may be worth while to try them with reference to typical rules of everyday application. The rules selected for this purpose should be well established, should be rules that dwell at peace with their neighbors in the legal system, are questioned neither by theoretical writers as arbitrary and anomalous, nor by practitioners as theoretical and over refined, and should have an authentic history. Two such cases will be considered.

In Roman law if a tree set in the land of Titius takes root in the land of Maevius, it belongs to Maevius; if it takes root in the land of each, it is common property.[9] What is the common law on this point? In *Masters* v. *Pollie* (1620) [10] it is held that in such a case the tree belongs to the owner of the land in which it is planted, because "the main part of the tree being in the soil of the plaintiff, the residue of the tree belongs to him also." It is added that Bracton so holds. But this is an error, for Bracton lays down the Roman rule in the very words of the Institutes.[11] In *Waterman* v. *Soper* (1697–98) [12] Lord Holt, apparently in ignorance of the prior decision, ruled that "if A plants a tree upon the extremest limit of his land and the tree growing extend its root into the land of B next adjoining, A and B are tenants in common of this tree." The reasons are not stated, but the words used indicate that the doctrine was taken from the Roman texts.[13] In *Holder* v. *Coates* (1827), [14] on both of the prior cases being cited, Littledale, J., followed the earlier, which he thought laid down the preferable rule, and such is now the recognized doctrine.[15]

Obviously the two distinct doctrines which contended in our law books for two hundred years do not represent a divergence in the practice of the English people or a divergence in popular, extra-

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[9] INST. II, 1, 31.

[10] 2 Rolle, 141.

[11] "For reason does not permit that a tree belong to anyone else than to him in whose land it has struck root." (1569 ed. fol. 10.)

[12] 1 Ld. Raym. 737. *Cf.* Anon., 2 Rolle, 255 (1623).

[13] *Cf.* "And therefore a tree planted near a boundary, if it stretch out its roots into the neighbor's ground also, becomes common property." INST. II, 1, 31.

[14] Moody & M. 112.

[15] Lyman *v.* Hale, 11 Conn. 177 (1836); Dubois *v.* Beaver, 25 N. Y. 123 (1862); Skinner *v.* Wilder, 38 Vt. 115 (1865).

legal views of what was naturally right. The English people did not practise one rule in this connection from the thirteenth to the seventeenth century, another from the end of the seventeenth century to the second quarter of the nineteenth century, and then revert to the seventeenth-century practice, except as the decisions of the courts may have determined individual action. Nor were these divergent lines of decision due to disagreement as to what was naturally, in contrast with what was legally, right. So far from trying to decide upon non-technical, non-legal grounds, in each case the basis of the rule announced was found either in authority or in juristic reasoning from analogy. Nor may these divergent lines of decision be attributed to class conflict or to any struggle of a dominant class to "impose its will upon those who are weaker." In each case the parties to the dispute were adjoining landowners — squires as like as not — and it is futile to search for any interest of landowner or landless on one side or the other. Moreover the origin of each rule may readily be traced.

To understand the doctrine of the Roman law we must go back to Aristotle, who lays down that plants are composed of the two elements earth and water drawn from the soil where they root.[16] Hence if the tree planted in the land of Titius takes root in the land of Maevius, the tree is composed of earth and water belonging to Maevius taken from Maevius by the tree on the land of Titius, but added in a definite tangible form, namely the tree, not in an undistinguishable form as in the case of alluvion. Thus the rule adopted by the Roman jurists grows out of the Aristotelian theory as to form and substance. One has in his mind the idea of a saw. He has in his hand the materials of steel and wood. By shaping these materials according to the idea of a saw he gives them the form of a saw.[17] Form, therefore, is the idea objectively realized. Accordingly the form of the tree is the material of the earth and water, taken from the soil, realizing the idea of a tree. Whoever owns the materials should also own the form. The very language of the jurists on this question of ownership of border trees, as preserved in the Digest,[18] is palpably taken from Greek philosophical

[16] HIST. ANIMAL. V, 1; METEOROL. IV, 8. See SOKOLOWSKI, PHILOSOPHIE IM PRIVATRECHT, I, 148 *ff.*

[17] BENN, THE GREEK PHILOSOPHERS (2 ed.), 282.

[18] DIG. XXIX, 2, 9, § 2, XLI, 1, 26, § 1.

treatises. It represents, not the practice of Romans in the third century A. D., nor the resultant of class struggles at Rome, then or theretofore, but the philosophical ideas of Greece in the fourth century B. C., seven centuries before, to which the jurists turned in their desire to decide controversies upon principles and in accordance with reason. And when Bracton, ten centuries later, felt called on to state a rule for such controversies, he did not take a referendum of the English people as to their views of what was naturally right, nor even ask himself what he thought was naturally right, nor did he send out a questionnaire as to what rule the people practised, if indeed they practised any on such a point, but he turned to the book which to him stood for an authoritative version of legal reason, and assumed as a matter of course that the rule there set forth should and would be followed by an English tribunal. Thus he laid down a rule in language seven hundred years old derived by a process of legal reasoning from a philosophical theory nearly seventeen hundred years old. When three centuries and a half later the Court of King's Bench ruled that "if a tree grows in a hedge which divides the land of A and B and by its roots takes nourishment in the land of A and also of B, they are tenants in common of this tree," [19] the Greek-philosophical Roman-law reason that the roots draw nourishment from each tract shows that the court relied upon Bracton.[20]

In the seventeenth century, as has been seen, the Court of King's Bench broke away from the Roman-law doctrine. Whether it did so intelligently and intentionally may perhaps be doubted, since Bracton was cited for a rule quite different from the one which he had announced. But in any event the basis of the new rule, which ultimately prevailed in Anglo-American law, was clearly enough the analogy of the old Germanic notion of seisin which had become one of the chief premises in common-law reasoning. In 1620 Coke had but recently been dismissed from his office of Chief Justice and had fourteen years yet to live. The judges and practitioners in the common-law courts were full of the ideas and methods made

[19] Anon. (1622), 2 Rolle, 255.

[20] Probably this was a case where it was not known on which side of the line the tree had been planted or one where it was originally planted on the line. But if the latter, why not hold that each owns the part on his land? It is reasonably evident that Bracton's text was a determining influence.

familiar to us by Coke upon Littleton. The Court of King's Bench was thoroughly in the grip of the strict law. Hence in endeavoring to decide a question according to reason it turned to a time-honored common-law analogy. Titius planted the tree and is seised of the trunk, which is the main thing, no matter where the roots may stray, and he cannot restrain these roots from wandering.[21]

When Lord Holt went back to the rule of the Roman law, a different spirit was becoming manifest in the common-law courts. The advocate of the economic interpretation may tell us, and tell us rightly, that a new economic order was behind the liberalizing of law throughout Europe which is marked on the Continent by the rise of the law-of-nature school and in England by the development of equity and the reception and absorption of the law merchant. But for the most part this liberalizing movement did no more than make thoughtful lawyers restive under the arbitrary rules of the strict law. Judges did not dream of finding law otherwise than through authority or through legal reason. If, therefore, there was no express rule in the common-law books, or if the old English authorities were not known to them, it was natural that they turn to the Roman books, which were regarded as an embodiment of pure legal reason. Lord Holt in particular was much inclined to cite and to rely upon the civil law.[22] When a particular Roman rule was taken over under the influence of this idea it by no means followed that it actually expressed sound legal reason. Often it had been formulated by the accidents of Roman legal history and expressed ideas which had lost their vitality already in antiquity.[23] Such exotics in our legal system are not to be explained by looking to the practice of the English people or to popular ideas of natural justice, nor can they be traced to struggles of class with class in English history or the self-interest of the dominant class for the moment. They derive rather from the belief

[21] "Le plaintiff ne poyet limit le roots del arbor how far they shall grow and go." 2 Rolle, 141 (1623).

[22] Lane *v.* Cotton, 1 Ld. Raym. 646, 652 (1701); Knight *v.* Cambridge, 2 Ld. Raym. 1349 (1724); Coggs *v.* Bernard, 2 Ld. Raym. 909, 915 (1703); City of London *v.* Wood, 12 Mod. 669, 686 (1701). In Lane *v.* Cotton he says: "The principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things." 12 Mod. 472, 482.

[23] I have discussed one remarkable example in a paper entitled "Legacies on Impossible or Illegal Conditions Precedent," 3 ILL. LAW REV. 1, 23.

of judges in an absolute justice discoverable through reason and an overtrusting faith that the Roman jurists possessed the key to reason.

When the rule which now prevails was established (1827), the Romanizing tendency was spent. The maturity of law has no little affinity with the strict law. It regards reason as much less important than adherence to the established rule.[24] As between what appeared to be the old historic English rule and a Roman intruder, the court did not hesitate. Just as in Coke's day,[25] lawyers took pride in the common law as an indigenous system, in competition with the Roman law, and the existence of a common-law rule was its own justification.[26]

Another instructive case for our present purpose is afforded by the law as to gifts of movables *inter vivos*. In the Roman law according to the *ius civile* title might be transferred by formal conveyance (*mancipatio*), and in that case no delivery was necessary. Or there might be delivery, in which case, if the subject of the gift was *res mancipi* possession for one year (*usucapio*) would transfer title. Until that period had elapsed, whether there was gift or sale, the title remained where it was prior to delivery. If, however, the subject of the gift was *res nec mancipi*, title passed by delivery (*traditio*) in any lawful transaction. There was also a third possibility. Without transfer of title, the donor might promise gratuitously to transfer the subject of the gift to the donee. If this was done by formal contract (*stipulatio*) the obligation was enforce-

[24] "We in England have long ago committed ourselves to the principle that, within limits to be settled by the House of Lords and Court of Appeal, uncertainty in the law is a worse evil than unreasonableness, and judges of first instance must continue 'falsely true' to the errors — if they are such — of their predecessors." Note in 24 L. QUART. REV. 117. "It is generally more important that the rule of law should be settled than that it should be theoretically correct." Lord Cottenham in Lozon *v.* Pryse, 4 My. & Cr. 600, 617 (1840). "It must be remembered that the rules which govern the transmission of property are the creatures of positive law, and that when once established and recognized, their justice or injustice in the abstract is of less importance to the community than that the rules themselves shall be constant and invariable." Lord Westbury in Ralston *v.* Hamilton, 4 Macq. 397, 405 (1862). "Uncertainty is the gravest defect to which a law can be exposed, and must at whatever cost be avoided." HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 43.

[25] *E. g.*, the remarks as to LITTLETON'S TENURES in the preface to COKE ON LITTLETON and in the preface to 12 REP.

[26] Cochrane *v.* Moore, 25 Q. B. D. 57 (1890). See DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 171 *ff.*

able by a condiction, which lay for *certa pecunia* or *certa res* due upon contract.[27] For the Romans enforced such an obligation through a claim of the promisee to the very thing promised, exactly as in our law we once allowed debt for a horse due upon an exchange of horses.[28] In each case the action preserves the memory of a time before the use of coined money when the promisor, typically a borrower, was thought of as one who wrongfully detained the creditor's property, although it might be property of a pecuniary character, so that return of an equivalent would suffice. But just as in debt for a chattel, or detinue, as it came to be, the plaintiff might have to be content with the money value of the thing, since his execution ran in the alternative, so under the Roman formulary procedure, unless the judgment debtor handed over the thing itself, there was ultimately a *pecuniaria condemnatio*.[29] Only a formal contract was so enforced.[30] Yet there was an obvious similarity between the gift without delivery and the gratuitous creation of an obligation to do or pay something. Hence it was easy to think of a contract of gift.[31] And as, on the one hand, the formal contracts lost their vitality and, on the other hand, the clumsy device of *actiones arbitrariae* was superseded by execution *in natura* (specific enforcement), the distinction between gift as a transfer of title and an agreement to give as the creating of an enforceable duty to transfer, was easily lost. As the enforcement *in specie* of the duty of the seller to transfer gave rise to a rule that the risk of loss was on the buyer, the thing sold being treated as part of his substance from the date of the sale regardless of delivery,[32] so specific enforcement of the contractual duty of the donor gave rise to an idea that the gift was complete upon acceptance, without more. The law of Justinian required no form. The *pactum donationis* was legally enforceable by compelling delivery, and so it could be said that the gift was complete without delivery.[33] The Roman

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[27] A brief account of this may be found in ROBY, ROMAN PRIVATE LAW, I, 527–28. As to the *condictio certi*, see DIG. XLV, 1, 74; DIG. XII, 1, 24.

[28] FITZHERBERT, NATURA BREVIUM, 119, I.

[29] GAIUS, IV, §§ 48–52.

[30] VAT. FRAGM. § 263.

[31] COD. V, 11, 6. See WINDSCHEID, PANDEKTEN, II, § 365.

[32] DIG. XVIII, 6, 8, pr.; DIG. XLVII, 2, 14; INST. III, 23, § 3.

[33] "Moreover they are complete when the donor has manifested his will in writing or without writing; and our constitution, after the example of a sale, has directed that

law world has received this doctrine from Justinian's books.[34] But the great Romanist generalization of the legal transaction (*Rechtsgeschäft, acte juridique*) — the declared will to bring about a legal result, given effect by the law — has led to a new way of treating it. In the Institutes, gift appears as a mode of acquiring title to property. In recent systematic works it appears among obligations.[35] Systematic writers indeed confess that so regarded it does not fit neatly into the general legal scheme. But this is of little moment under a legal system by which one who has a contract right to property is as assured of getting it *in specie* as is one who has title, or, to put it in the language of our law, the equitable title is as good as a legal title.

At common law the question was first definitely decided in *Irons* v. *Smallpiece* (1819).[36] The action was trover for two colts. The plaintiff (donee) was the son of the donor and defendant was the donor's executrix and residuary legatee. Six months before the donor's death he orally gave the colts to plaintiff, but they remained in the donor's possession till his death. It appeared, however, that the donee agreed to pay a stipulated price for the hay furnished the colts after the gift. Thus on the one hand the gift so near in time to the donor's death had a certain testamentary flavor, on the other hand, the agreement to pay for the hay amounted to an acceptance of the gift, and if a legal transaction of oral gift and acceptance were to be recognized by the law as having the effect of passing title, there was enough. The Court of King's Bench took the view that property did not pass. Abbott, C. J., relied on the undoubted rule requiring delivery in case of gifts *causa mortis*, which he said could not be distinguished. Holroyd, J., said that "to change the property by a gift of this description [*i. e.* without deed] there must be a change of possession." But Lord Hardwicke had expressed a doubt whether the analogy of gifts *causa mortis* was applicable,[37] and after *Irons* v. *Smallpiece* many judges in-

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they involve a duty of making delivery, so that although there has been no delivery, they have full and perfect effect and the donor is under a duty of making delivery." INST. II, 7, § 2. Compare conversion by contract in the Anglo-American law as to vendor and purchaser of land.

[34] FRENCH CIVIL CODE, Art. 938; BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL (11 ed.), III, §§ 803–06; SCHUSTER, PRINCIPLES OF GERMAN CIVIL LAW, §§ 199–200.

[35] See DERNBURG, PANDEKTEN (8 ed.), II, § 363, note 2.

[36] 2 B. & Ald. 551.

[37] Ward *v.* Turner, 2 Ves. Sr. 431, 442 (1752).

sisted *arguendo* that a clear distinction between gifts *inter vivos* and gifts *causa mortis* ran through the books and had been ignored in that case.[38] It was argued that "the question to be determined is not whether there has been an actual handing over of the property manually, but whether . . . there has or has not been a clear intention expressed on the part of the donor to give and a clear intention on the part of the recipient to receive and act upon such gift." [39] It was said that retention of possession could only be evidentiary upon the real question as to intention.[40] It was said that in case of a gift *causa mortis* there was a reason for requiring some formal act, whereas in case of a gift *inter vivos* it was enough that "the conduct of the parties should show that the ownership of the chattel has been changed." [41]

After controversy had raged for seventy years or more, some approving the doctrine of *Irons* v. *Smallpiece*,[42] but more disapproving it, the matter was set at rest in *Cochrane* v. *Moore*.[43] Now the historical method was at the height of its vogue. Accordingly the elaborate opinion of Fry, L. J., proceeds neither upon analogy nor upon analytical reasoning as to the elements of the legal transaction of gift, but upon an elaborate historical investigation, beginning with Bracton and carried down through the Year Books, as a result of which he concludes that "according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery; that on that law two exceptions have been grafted, one in the case of deeds and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery." [44] The resulting rule, requiring delivery in case of gifts *inter vivos*, has been generally accepted.

Looking back over the development of the divergent doctrines of the civil law and of our own law upon the two subjects discussed,

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[38] Crompton, J., in Winter *v.* Winter, 4 L. T. (N. S.) 639, 640 (1861). See Serjt. Manning's note (*a*), 2 M. & G. 691 (1841).

[39] Pollock, B., in *Re* Harcourt, 31 WKLY. REP. 578, 580 (1883).

[40] Cave, J., in *Re* Ridgway, 15 Q. B. D. 447 449 (1885).

[41] Crompton, J., in Winter *v.* Winter, *supra*.

[42] Kelley, C. B., in Douglas *v.* Douglas, 22 L. T. (N. S.) 127, 129 (1869). *Contra*, Parke, B., in Ward *v.* Audland, 16 M. & W. 862, 870 (1847), and Oulds *v.* Harrison, 10 Exch. 572, 575 (1854).

[43] 25 Q. B. D. 57 (1890).

[44] *Id.* 72–73.

we may see five different processes by which legal rules have been worked out juristically and judicially in the past. The first and crudest is a method of eking out binding authority by differences and analogies, illustrated by the common-law adjudication of the question of ownership of border trees on the analogy of seisin of the trunk, by the controversy as to the analogy of gifts *causa mortis* and gifts *inter vivos* in the English cases, and by the Roman rule that no delivery is necessary in case of gifts *inter vivos*, rested in the Institutes on the analogy of a sale.[45] The second is generalization from procedure, illustrated by the Roman-law doctrine of gift *inter vivos* without delivery as an inference from specific enforcement of a *pactum donationis* and the common-law doctrine of gift by deed without delivery as an inference from the procedural force of a seal in estoppel by deed. Out of these two develop the scientific method of systematic analysis, illustrated in the civil law by the theory of a gift as a legal transaction, in which the declared will to give and to accept is given effect as such, without more, and in the common law by the theory of gift as made up of the elements of declared intention to give plus manifested intention to accept, a theory obviously related to the Romanized conception of obligations which had no little currency in nineteenth-century England. It should be noted in passing that although this theory did not establish itself in the case of gifts *inter vivos*, it has left its mark in the rule as to gratuitous declarations of trust without transmutation of possession, so that "I give" and "I accept" are nugatory without delivery, and "I promise to give" and "I accept" are nugatory without consideration, while "I hold in trust for you" is good upon the sole basis of intention without anything more.[46]

A fourth method disclosed is historical. The history of legal institutions and legal doctrines is relied upon to give us a conception or a principle from which the rule for a particular situation may be reached. This is illustrated by the decision in *Cochrane* v. *Moore*. Lastly, we see a philosophical method, a method of deduction from some extra-legal philosophical principle, illustrated in Roman law by the doctrine as to border trees, derived from Aristotelian metaphysics and Artistotelian natural philosophy, and

[45] See *supra*, note 33.

[46] *Ex parte* Pye, 18 Ves. 140, 150 (1811). See the concise statement of these distinctions in WILLIAMS, PERSONAL PROPERTY (17 ed.), 70.

the civil-law doctrine of gift as a legal transaction, based ultimately in part on analysis and in part on philosophical theories of the intrinsic binding force of promises, fortified by nineteenth-century philosophical theories as to free assertion of the individual will. In short, instead of the conscious or subconscious search for or formulation of the practice of the people, or of what seemed naturally just to the lay public, or the inexorable operation of the self interest of a dominant class, which have been pictured to us, we see the gradual development of a scientific technique, designed to preclude vague gropings for extra-legal ideas of the naturally just, which vary with the impulse of the moment or the character of the magistrate, and to repress the pressure of individual or class self-interest by imposing objective standards of finding, interpreting and applying the law. Beginning by imposition of a hard and fast yoke of authoritative rule, literally interpreted and mechanically applied, men learn to eke out authority by distinctions and analogies and presently to generalize cautiously from established remedies and established procedure. Later they learn to use three truly scientific methods — the analytical, the historical and the philosophical. Under our eyes they are beginning to learn a further method of taking account of the social environment of the application of legal rules, of their social effects in action, of the interests to be secured and the effective means of securing them. The significant feature of this scientific development is not the occasional failure to keep down the eternal pressure of self-interest, but rather the success which has attended centuries of persistent human effort to overcome instinctive action and put in its place conscious direction of the human will toward an ideal justice.

Law is a practical matter. Legal traditions have persisted largely because it is less wasteful to keep to old settled paths than to lay out new ones. If one were laying out streets anew in the older portion of one of our modern cities that dates back to colonial times, and were proceeding solely on the basis of convenience of travel from place to place, proper accommodation for use of the streets by public utilities and light and air for the buildings that now rise on each side, we may be sure that the map would look very different. Often the streets got their form by chance. They were laid out at the fancy of this man or that according to his ideas for the moment, or, laid out by no one, they followed the lines of travel

as determined by the exigencies of the first traveler. Today it may well be more wasteful to relay these lines than to put up with the inconvenience of narrow, crooked, irregular ways. Many legal paths, laid out in the same way are kept to for the same reason. When the first case on the new point called for decision, judge or jurist, seeking to decide in accordance with reason, turned to a staple legal analogy or to an accepted philosophical conception and started the legal tradition in a course which it has followed ever since. Thus the really universal truth in the economic interpretation is to be found in a conception of law as a social device to eliminate friction and to prevent waste; as one of the means by which civilization conserves energy and conserves the goods of existence to meet human wants.

But the great source of friction is human wilfulness [47] and the great cause of waste is insecurity. Hence throughout legal history men have been solicitous above all things to hold down arbitrary and capricious action, whether of private individuals or of magistrates, and to conserve the general security. Undoubtedly magisterial arbitrariness has sometimes been a bogie. Aristotle feared to allow recovery of eighteen *minae* proved due in an action for twenty *minae* lest to permit the dikasts to do anything but decide the formal issue might turn orderly legal adjudication into mere haphazard arbitration.[48] Scaevola thought it required a strong judge to allow a set-off.[49] The English Serjeant at Law who replied to Doctor and Student objected to injunctions against enforcement of a bond paid but not formally released "for as moch as conscience is a thinge of greate uncertaintie."[50] Selden thought the measure of equity might quite as well be the chancellor's foot.[51] Jefferson would have received English law as of the first year of George III, in order to "get rid of Mansfield's innovations" in the way of absorbing equity and the law merchant into the common law.[52] Thus the paramount social interest in the general security

[47] "Man . . . just in his intelligence and perverse in his will." DEMAISTRE, DU PAPE, Bk. 2, chap. 1.

[48] POLITICS, II, 8 (Jowett's translation, I, 48–49).

[49] CICERO, DE OFFICIIS, III, 17, § 70.

[50] HARGRAVE, LAW TRACTS, 326.

[51] TABLE TALK, tit. Equity.

[52] TYLER, LETTERS AND TIMES OF THE TYLERS, I, 265. Compare the quotations in note 24, *supra*.

has dictated orderliness, certainty, system and rule in the administration of justice so that men may rely on appearances and act with assurance in their everyday activities unworried by the aggressions of others and unharassed by the caprice of their rulers. The intense desire to exclude the personality of the magistrate for the time being at almost any cost has left its mark on the law beyond any other factor in law making.

Primitive law sought to insure that one will should not be subjected arbitrarily to the will of another by reliance upon chance. The strict law relied instead upon hard and fast rule, upon form and upon mechanical procedure. Equity and natural law relied rather upon reason and an attempt to identify law and morals at a time when philosophical or religious systems of morals were generally accepted and appeared to furnish universal standards. The maturity of law turned to logical development of conceptions derived from supposed ultimate metaphysical data, at a time when men believed in the absolute, or to logical deduction from principles derived from history, under the influence of positivist views derived from the analogy of scientific study of external nature. So far from being means of allowing popular ideas of natural justice to play freely upon the magistrate's conscience or to enable him to formulate effectively the postulates of the self-interest of a dominant class, these were all conscious devices to enable him to resist himself and his fellows and conscious attempts to attain an absolute objective standard of justice.

A prime cause of difficulty in all discussions of this subject grows out of the mistake of thinking of a body of developed law as wholly made up of rules. Austin was a chancery barrister at a time when English equity was chiefly taken up with the enforcement of family settlements and trusts, and the equity lawyer was of necessity an expert in the law of real property. Hence he thought of law largely in terms of rules of the law of property. This attitude has undoubtedly colored Anglo-American analytical jurisprudence ever since.[53] Moreover lay writers who have urged the economic

[53] Thus, MARKBY, ELEMENTS OF LAW, § 7 (1871), defines law as a "body of rules;" HOLLAND, JURISPRUDENCE, chap. 3 (1880), defines a law as "a general rule of human action" and, after BENTHAM (WORKS (Bowring ed.), I, 141) takes law to be an aggregate of such laws; ANSON, LAW AND CUSTOM OF THE CONSTITUTION, I, 8 (1886), speaks of law as made up of "rules of conduct;" POLLOCK, FIRST BOOK OF JURISPRUDENCE, 17 (1896), defines law as "the sum of the rules of justice administered in a state."

interpretation in various forms have thought of law in terms of penal legislation and have assumed that it is a body of definitely fixed rules imposed by a definite authority.[54] Primitive law may show us a hard and fast rule for every case with a tariff of exactly fixed compositions for every cognizable species of wrong. But in its maturity law is much more complex. In truth, developed law exhibits three types. First we find rules, such as Austin wrote of, *e. g.*, the rule in Shelley's Case, the rule against perpetuities, the rules as to when and what covenants will run with the land, the rules as to what is a negotiable instrument, how it may be transferred and the effect of different modes of transfer, and the sections of a penal code.[55] The advocate of the economic interpretation goes to the latter for illustrations. Second, we find standards, such as the standard of due care or of the diligence of a reasonable man, the standard of the reasonable man in the objective view of fraud, duress and mistake, the standard of reasonable service in the law of public utilities; or in the Roman law of contracts the standard of *diligentia quam suis*, of *diligentia cuiusvis hominis*, of *diligentia boni et diligentis patrisfamilias*. We have sometimes been told that these are not law at all.[56] And they are not if we think of law as an aggregate of rules. The rule, so we are told, is that a certain standard be applied to certain situations. These standards have a variable application with time and place, and contain a large moral element. Yet they are significant legal institutions. The legally defined measure of conduct, applied by or under the direction of a tribunal is as much a part of the machinery by which organized society secures interests as the precise rules which it uses for the same purpose in other situations.[57] It is here that Judge Baldwin's proposition as to the practice of the people and popular ideas of what is naturally just finds its justification. For the cardinal notion is one of protecting the public at large in a reasonable re-

[54] See my discussion of this subject in 25 HARV. L. REV. 162, 167, 500.

[55] Compare the common-law principle as to what is a misdemeanor with the rules in our penal codes.

[56] Hence the attempt, now generally given over, to establish a body of fixed rules that this or that thing — *e. g.*, not stopping, looking or listening at a railroad crossing, getting on or getting off a railroad car when in motion — is negligence absolutely in and of itself without reference to circumstances. Hence also the attempts to fix degrees of care or degrees of negligence. Compare also KEENER, QUASI CONTRACTS, 104–07.

[57] See HOLMES, COMMON LAW, Lect. 3.

liance on the way in which others will conduct themselves in this situation or that, as a means of promoting the general security. Third, we have what may be called principles, that is premises for juristic deduction, to which we turn to supply new rules, to interpret old ones, to meet new situations, to measure the scope and application of rules and standards, and to reconcile them when they conflict. These principles are the living part of the legal system and are its most significant institution. Here also the hand of the jurist and the work of legal speculation are most conspicuous.

Examples of such principles or general premises of the legal system are the Roman conception of *negotia bonae fidei*, resulting in a relation or obligation with incidental duties of good faith on each side, quite apart from what had been expressed; the modern civilian conception of the legal transaction, the declared intention given effect as such by law in order to effectuate the will of the actor; the principle that one person is not to be enriched unjustly at the expense of another; the doctrine that a loss is not to be shifted from one innocent person to another equally innocent, which plays so large a part in Anglo-American equity; the principle that liability is a corollary of fault, which was so fruitful in our nineteenth-century law of torts, and the more recent principle that harm intentionally caused is actionable unless justified. Some of these make their way in the law and become permanent acquisitions of the system of administering justice. Some prove ephemeral. Some for a season do positive harm before they are rejected. In any event these general principles and conceptions, through which jurists endeavor to make the law as it has developed logical and intelligible, react powerfully upon the law itself and have much to do with shaping its course. Thus the generalization that liability to repair an injury is a corollary of culpability has had much to do with departures from and limitations of historical common-law rules as to absolute liability of carriers and absolute liability of keepers of animals, and with the attitude of American courts toward the doctrine of *Rylands* v. *Fletcher*. And the principle that intentional injury must be justified has been molding the whole chapter as to injuries to advantageous relations which the courts have been writing in the last generation.

William James tells us that "the course of history is nothing but the story of men's struggle from generation to generation to find

the more inclusive order." [58] Certainly such has been the course of the history of legal doctrine. But here, too, the endeavor has been to prevent friction and eliminate waste. In law this means an endeavor to eliminate the arbitrary and illogical; a conscious quest for the broad principle that will do the work of securing the most interests with the least sacrifice of other interests, and at the same time conserve judicial effort by flowing logically from or logically according with and fitting into the legal system as a whole.

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[58] THE WILL TO BELIEVE, 196.